by *Humphrey and Rolle* (where undisputed criminal convictions were the baiss of the Authority's termination of tenancy action), or by *Escalera* (where the complaint admitted that the dog had been harbored for years in the project apartment). The Second Circuit explicitly confined itself to review of "the constitutionality of the procedures by the HA" (Appx. A, 19a; 425 F. 2d at 864; see also Appx. A, p. 14a; 425 F. 2d at 861-862), showing that the relevance between the particular facts in each of the termination of tenancy cases was not examined or relied upon as the basis to premise the foregoing constitutional deprivations of procedural due process. As was said by the Court of Appeals for the District of Columbia: "A hearing is required only in so far as it is required to resolve contested issues of fact that will affect the outcome of the proceeding." *Hunt Oil Co. v. FPC*, 424 F. 2d, 982, 987 (D.C.C. 1970). The same court has ruled: ". . . a hearing is not required where no such issues exist. Neither the statute nor the constitutional imperative of due process requires such an exercise in futility." *Amalgamated Clothing Workers of America v. NLRB*, 424 F. 2d 818, 829-830 (D.C.C. 1970).

Consequently, in view of the adequate, rational basis for the Authority's administrative determination on the facts in each case, the Second Circuit was foreclosed from entry into the domain of constitutional adjudication.

These cases, however, are ripe now for review by this Court because those procedures which have been brought into question and the recitals in respondents' complaints as to what transpired in each particular case, provide this Court with a full and adequate picture of the Authority's termination of tenancy procedures (which are filed in the office of the New York Secretary of State and the New York Commissioner of Housing and Community Renewal, New York Public Housing Law, section 54, McKinney's Laws, 1955, Book 44A) and its regulations dealing with

additional rent charges to enable it to make an informed decision on any valid constitutional questions presented by the complaints. The assertions in the Escalera-Rolle Brief as to alleged "factual disputes" (p. 5) is without serious constitutional import in respect to the questions to be decided because the TRB Handbook, as the name implies, is for internal use only and does not add to or detract from the nondesirability standards established by the Authority and furnished to the tenant.

Counsel for respondents, Escalera-Rolle, suggest that the Court may avoid unnecessary constitutional adjudication in these cases by denying certiorari because there is some indication that the Department of Housing and Urban Development (HUD) has given consideration to the issuance of new regulations and recommendations dealing with tenants' leases and grievance procedures (Escalera-Rolle Brief, p. 7). In the footnote to their discussion of this matter, counsel for these respondents candidly admit that: "... there is no guarantee that they will in fact be issued," and the letter from an official of HUD directed to counsel for these respondents, annexed to the Supplemental Memorandum of Escalera-Rolle, shows that nothing concrete or tangible has been agreed upon. Nor is there any indication of the scope and extent of the possible regulations, which may or may not be issued in the form of recommendations to local public housing authorities, which would impinge upon the particular issues now before the Court.

It is notable that the proposed recommendations and regulations would be applicable to federally-aided projects only; half of this Authority's projects are not federally-aided (see *Holmes* v. *New York City Housing Authority*, 398 F. 2d 262, 263, 2 Cir. 1968.* Respondent Escalera resides in Wald Houses, a state-aided project and Rolle resides in Riis Houses, a city-aided project, both of which are without the jurisdiction of HUD.

Counsel for these respondents have also sought to invoke the dissent of the justices in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), which suggested that the majority in that case should stay their opinion because federal regulations dealing with the subject matter of the litigation were to become effective July 1, 1970. Of course, that argument is less than persuasive because it was not followed in that case, but more to the point, in *Goldberg* v. *Kelly* there were specific, concrete regulations which were scheduled to go into effect on July 1, 1970. Nothing of that kind exists in respect to the present cases.

B. Availability Of Article 78 Judicial Review In The New York State Supreme Court Obviates The Constitutional Questions Raised In These Cases.

Respondents contend, and the Second Circuit concurred, that the "burdens" of seeking article 78 review in the New York State Supreme Court overcome any benefits to be derived from such judicial review. (Appx. A, p. 22a, 425 F. 2d at 866; Escalera-Rolle Brief, p. 9 fn.; Lockman-Humphrey Brief, p. 7 fn.). However, respondents, Lockman-Humphrey (Brief, p. 7 fn.) concede that article 78 proceedings provide judicial review as to whether this Authority made a determination that was "arbitrary, capricious or an abuse of discretion", and the Second Circuit noted that the Authority would, in any event, be compelled in an article 78 proceeding to reveal the

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* Contrary to the statement in the Lockman-Humphrey Brief (p. 8), the *Holmes* decision, based upon a motion to dismiss the complaint, found that the Authority's admission procedures for state-aided projects were deficient, since they were not set forth, although the admission procedures for federally-aided projects were found to have a valid objective scoring system to determine priority for admission to these housing projects (398 F. 2d at 264-265). The Authority's answer in that action denies the allegations of the complaint and shows that a uniform, objective system of admission procedures is followed for applicants for all projects.

ground for its termination of tenancy action (Appx. A, p. 22a, fn. 9, 425 F. 2d at 866 n. 9). In such a review proceeding, it is established law in New York that an administrative body which does not conduct a formal trial hearing must show that it acted upon "proper data and evidence" (*Meschino* v. *Lowery*, 34 A D. 2d 255, 258, 310 N.Y.S. 2d 908, 911, App. Div. 1st Dept, 1970). In addition, the recent successes of plaintiff public housing tenants in *Vinson*, *supra*, and in *Williams* v. *White Plains Housing Authority*, 62 Misc. 2d 613, 309 N.Y.S. 2d 454, 1970, attest to the efficacy of the article 78 remedy to rectify complaints of procedural due process in public housing termination of tenancy cases.* The Second Circuit itself cites the *Williams* and *Vinson* decisions in support of its holdings at several places.

In *Stewart*, *infra*, where it was also argued that to require a tenant to seek judicial review to complain against the procedures followed by the Chicago Housing Authority placed an undue burden upon the tenant (Stewart Brief to the U. S. Supreme Court, p. 9), this Court refused to grant certiorari. It has never been ruled, as the Second Circuit ruled in the instant cases, that the "burden" of seeking judicial review of a state administrative determination is so disabling and burdensome as to constitute a constitutional infirmity under the due process requirements of the Fourteenth Amendment (Compare *Lee* v. *Habib*, 424 F. 2d 891, 901, D.C.C. 1970). This Court's holdings are to the contrary (*Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268, 284 (1969); *Toomer* v. *Witsell*, 334 U. S. 385, 392, 1948; *Bourjois, Inc.* v. *Chapman*, 301 U. S. 183, 189-190, 1937), and the Second Circuit holding overturns established law in this respect. Cf. *Goldberg* v. *Kelly*, *supra*, 397 U. S. at 260.

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*See also *Sanders* v. *Cruise*, 10 Misc. 2d 533, 173 N.Y.S. 2d 871 (1958); *Johnson* v. *New Rochelle Housing Authority*, 44 Misc. 2d 138, 253 N.Y.S. 2d 39 (1964).

C. The Randell And Stewart Cases Are Irreconcilable With The Holding Of The Second Circuit And Therefore This Court Should Examine The Validity Of The Escalera Judgment In Light Of Those Holdings.

1. *Randell* v. *Newark Housing Authority*, 384 F. 2d 151 (3 Cir., 1967), cert. denied *sub nom. Arent* v. *Newark Housing Authority*, 393 U. S. 870 (1968).

The Escalera-Rolle Brief (pp. 11-12), in discussing the *Randell* case, *supra*, fails to come to grips with what were the major issues presented in that case and the disposition made of those issues. First, the tenants there complained against the use of "secret files" in effecting termination of tenancy (Randell Brief to U. S. Supreme Court, p. 6). It was further claimed that a Newark Housing Authority tenant is evicted without affording him a full trial on the merits in the state court in the eviction proceeding (*Id.*, pp. 7 and 14), which parallels the practice which obtains in eviction proceedings brought by this Authority in the New York City Civil Court. (It is to be noted that in discussing the availability of review to a tenant in a New Jersey eviction proceeding, the Escalera-Rolle Brief, p. 12, inaccurately characterizes these state eviction proceedings as offering a tenant a "'judicial hearing on any claimed denial of due process in his eviction'", quoting from the Randell opinion by the Third Circuit. However, as noted above, the Randell plaintiffs in their brief to this Court had claimed otherwise.) Finally, the fact that the Newark Housing Authority failed to accord to the complaining tenants an administrative hearing (Randell Brief to U. S. Supreme Court, pp. 1-2), is entirely glossed over by these respondents. Despite this catalogue of contentions in Randell of unconstitutionality, this Court refused to grant certiorari.

The Lockman-Humphrey respondents (Brief, p. 9) concede that the Randell case raises "somewhat comparable

basic issues" and that the Third Circuit suggested abstention which was ultimately effected by the District Court. Abstention should likewise be considered in the disposition to be made in this petition for certiorari because the solution to the intricate problems connected with many of the questions raised in these cases have been entirely removed from consideration by state authorities and state courts as a result of the Second Circuit judgment. Compare *Zwickler* v. *Koota*, 389 U. S. 241, 249 n. 11 (1967).

2. *Chicago Housing Authority* v. *Stewart*, 43 Ill. 2d 96, 251 N. E. 2d 185 (1969), *cert. denied*, 397 U. S. 1000 (1970).

Respondents, Escalera-Rolle, ignore the *Stewart* decision altogether. Respondents, Lockman-Humphrey, inaccurately describe the basis for termination of tenancy in Stewart as "non-payment of rent" (Brief, p. 10). Actually, the basis was repeated delinquency in the payment of monthly rent. These respondents overlook the contentions made to this Court by Stewart that (as contended in *Randell* and by all of these respondents in their complaints) the public housing tenant in Chicago has no opportunity in state court eviction proceedings to litigate "the causes for eviction" (Stewart Brief to U. S. Supreme Court, p. 6), which was claimed to be a deprivation of procedural due process. Finally, the Lockman-Humphrey respondents ignore the fact that Stewart complained that he was deprived of a fair administrative hearing or a court procedure to enable him to present his defense to the proposed termination of his tenancy and eviction (*Id.* pp. 9-10).

The holdings of the Third Circuit in *Randell* and of the Illinois Supreme Court in *Stewart*, where this Court denied certiorari to the petitioning tenants in both instances, are in direct conflict with the holding made by the Second Circuit in these cases on the foregoing issues. The holding of the Second Circuit is also in conflict with a hold-

ing of the Mississippi Supreme Court in a public housing termination of tenancy case which has been docketed for possible review in this Court, *Hooker* v. *Brookhaven Housing Authority*, U. S. Supreme Court, Docket No. 2358 Misc., and another by the Fourth Circuit, decided on July 31, 1970, *Johnson* v. *Tamsberg, Executive Director, Housing Authority of Charleston*, No. 13, 941.

D. There Is An Urgent Need For Review Of The Second Circuit Decision Which Affects Widespread Administrative Activities Of Public Housing Authorities.

The manner in which the issues have been decided in these cases will seriously affect the efficient and proper functioning of the national program to provide public housing. In addition, the Second Circuit decision impairs the specific, declared objectives enunciated by Congress for the more efficient operation of low-rent public housing projects (See Appx. A, p. 123a). The Second Circuit decision, dealing with several questions expressly left open by this Court in *Thorpe*, *supra* (393 U. S. at 283-284), over-judicializes the administrative activities of public housing authorities in terminating tenancies and for recovery of additional rent charges for damage to property and breach of regulations. These are cases of first impression, testing the reach and extent of the Civil Rights Act and the application to public housing authority operations of concepts of procedural due process under the Fourteenth Amendment; they should command consideration by this Court at this time because of their nationwide importance and impact.

Although the concluding portion of the Second Circuit decision (Appx. A, 24a-25a; 425 F. 2d at 867) is expressed in precatory terms, the categorical and unqualified nature of the earlier pronouncements have created serious problems for public housing authorities regarding the invalidity of the notice served on tenants (where the Second

Circuit confuses the difference between an adequate notice in the context of these administrative procedures and the evidence later adduced in support of the charges in the notice, compare *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 224-225, 1938); because public housing authorities are mandated to allow cross-examination in all cases irrespective of the relevancy or necessity in a particular case (Compare *FCC* v. *WJR*, 337 U. S. 265, 274-275, 1949; *United States* v. *Storer Broadcasting Co.*, 351 U. S. 192, 205, 1956); requiring tenants' folders to be made available in all instances in termination of tenancy and additional rent charges in total disregard of long-established rules providing for appropriate discovery both in federal and state jurisdictions (See *United States ex rel. Meadows* v. *New York*, 426 F. 2d 1176, 1184, 2 Cir. 1970), and despite the fact that use of a folder constitutes no more and is no worse than the reception of hearsay evidence at an administrative hearing, because the Authority's determination must ultimately rest upon "proper data and evidence", *Meschino*, *supra*, i.e., a rational basis, which on undisputed facts exists in each of the termination of tenancy cases herein (see *Massachusetts Trustees* v. *United States*, 377 U. S. 235, 246-248, 1964; *Consolidated Edison Co.* v. *NLRB*, *supra*, 305 U. S. at 230; compare *Bruton* v. *United States*, 391 U. S. 123, 135, 1968.

Fourth, the Second Circuit directed that the Authority must afford an adversary proceeding at the administrative level with all of the foregoing incidents of such proceedings despite the fact that the tenant may either concede the validity of the Authority action (see *Thorpe*, *supra*, 393 U. S. at 284), and when the aggrieved tenant still retains the right in all instances to pursue state judicial remedies irrespective of the outcome at the administrative level (*Thorpe*, *supra*, *id.*). These unprecedented requirements have tended to sow confusion and doubt in the relevant activities of this public housing authority and will, in turn, affect like operations by public housing au-

thorities throughout the land unless a prompt decision is made to resolve these questions. The increased influx of public housing authority cases since *Thorpe*, raising questions left unanswered by that decision, requires a definite answer by this Court at this time.

The law of the case established by the Second Circuit's opinion in respect to the foregoing matters and its holding that a class action on behalf of all public housing tenants has been set forth if other routine prerequisites of Rule 23(a), Fed. R. Civ. P., are established (Appx. A, p. 24a, 425 F. 2d at 867), foreshadows that a temporary injunction most certainly will issue from the District Court to implement the categorical holdings enunciated by the Second Circuit in these four cases in respect to the Authority's procedures (See Appx. A, p. 14a, 425 F. 2d at 861-862), and housing authority activities in the areas under consideration will be brought to a halt until the questions are ultimately resolved by this Court.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted, and such other and further relief should be granted as the Court may deem appropriate and necessary.

September 4, 1970.

Respectfully submitted,

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